Supreme Court, U.S.
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No. 94-1446

In The

Supreme Court of the United States

October Term, 1994

McMILLION DOZER SERVICE, INC.,

Petitioner,

v.

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Was a Louisiana statute, effective between 1988 and 1992, which provided for interest to be paid on an award of excess compensation from the date judicial demand was made violative of the Fifth Amendment to the U.S. Constitution?

II.

Did the entire statutory and constitutional framework for compensation for the taking of property between 1988 and 1992 in Louisiana violate the Fifth Amendment to the U.S. Constitution?

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STATEMENT OF THE CASE

On March 28, 1989 the Louisiana Department of Transportation & Development filed an expropriation suit against McMillion Dozer Service, Inc. pursuant to the authority which it has under Title 48 of the Louisiana Revised Statutes, commonly known as the Quick Taking Statute. In accordance with the provisions of that statute, the State deposited the sum of $487,952.00 into the registry of the court as an estimate of just compensation for the land taken and severance damages to the defendant's remaining land. On August 16, 1990 the defendant filed an answer requesting additional compensation for the property expropriated, severance damages to its remaining land and delay damages for the 5 year period preceding the expropriation.

The case was tried before the jury from January 12 through 14, 1993. The jury awarded additional compensation above the deposit in the total amount of $563,048.00, which was divided into the following categories:

$ 77,000.00	–	additional compensation for the property taken
$186,048.00	–	additional compensation for severance damages
$300,000.00	–	compensation for delay damages

The judgment incorporating the jury award provided for legal interest on these amounts from the date the expropriation suit was filed, March 28, 1989, until paid. The State filed an appeal to the appropriate appellate court challenging the jury award for delay damages and requesting that the legal interest on the excess awards be

amended to run from the day the answer was filed according to the statute in effect at the time the suit was filed. The State did not appeal the additional awards for the property expropriated nor severance damage to the remaining property of the defendant. The Fifth Circuit Court of Appeal for Louisiana refused to grant the relief sought on the issue of the delay damages, but did amend the Trial Court judgment to provide that interest on the additional amounts should only run from the date the answer was filed, August 16, 1990, rather than the date the expropriation suit was filed, March 28, 1989. Applications to the Louisiana Supreme Court by both the State of Louisiana on the delay damage issue and by McMillion on the interest issue were denied.

SUMMARY OF ARGUMENT

Petitioner argues that the Fifth Amendment to the U.S. Constitution absolutely requires the payment of interest on excess compensation awards from the date that an expropriation suit is filed in formal expropriation proceedings. The State of Louisiana has always provided for the payment of legal interest on awards for excess compensation above that deposited in the registry of the court at the time the expropriation suit is filed. For the 4 years between 1988 and 1992, however, the State decreed by statute that legal interest on such awards would begin to run only from the date written demand for such awards was filed by the landowner rather than from the date the State filed its expropriation suit. The State contends that this was not an arbitrary restriction on interest

because legal interest on other types of awards traditionally begins from the date of judicial demand and because the landowner could file the answer containing the demand for additional compensation at any time after the expropriation suit was filed. The State contends that this was not an infringement of any right to interest which may exist under the Fifth Amendment to the U.S. Constitution.

Even if this Court were to feel that the Fifth Amendment requires interest on compensable excess awards from the date an expropriation suit is filed, the State of Louisiana contends that this landowner has been paid compensation in an amount which far exceeds anything it could have recovered under the Fifth Amendment to the U.S. Constitution as applied by the Federal courts. The reason for this is that the award of $300,000.00 for delay damages for the 5 year period prior to the formal expropriation by the State of Louisiana in 1989 was not compensable under Federal law. Had this been an expropriation proceeding brought in federal court pursuant to the Fifth Amendment to the U.S. Constitution, the only recovery by the landowner would have been for the property actually expropriated and severance damages to its remaining land. There would have been no recovery for delay damages. Thus, the total amount recovered by the landowner under the Louisiana scheme of compensation pursuant to its constitution and statutory authority far exceeds anything the landowner could have recovered in federal court under the provisions of the Fifth Amendment to the U.S. Constitution.

The State would also point out to this Court that the landowner failed to follow the procedure necessary to raise this issue in the Louisiana courts and that the issue is now moot because the interest statute was amended in 1992 to return the beginning date for the payment of interest to its pre-1988 status. Therefore, no significant federal question is raised by this application which needs consideration by this Court.

ARGUMENT

By this writ application, McMillion Dozer seeks to have this Court restore the legal interest on the excess compensation awarded between the date the expropriation suit was filed and the date the answer demanding additional compensation was filed, a period of approximately 16 1/2 months. Petitioner argues that the Fifth Amendment to the U.S. Constitution mandates the payment of legal interest from the date of taking. The primary case relied on by petitioner is *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S. Ct. 2187 (1984). For several reasons, *Kirby* is not dispositive of the issue raised by petitioner; indeed, the specific issue raised by this writ application, i.e. whether or not interest on compensation may be paid from date of demand as opposed to date of taking, was not addressed in *Kirby*.

Kirby involved a "straight-condemnation" proceeding wherein a suit was filed to indicate the interest in the United States in taking property without actually taking title to the property unless the government subsequently

decided to do so after a trial on the issue of compensation. In the instant case, the State of Louisiana actually acquired title to the property upon the filing of the petition and the deposit of the estimate of just compensation in the registry of the court. The procedures involved in the two cases are different. The narrow issue involved in *Kirby* was set forth by this Court as follows:

> "We granted certiorari to resolve a conflict in the circuits regarding a date on which the taking, in a 'straight condemnation' proceeding should be deemed to occur and the constitutional obligation of the United States to pay interest on the adjudicated value of the property." *Kirby* at p. 10.

In the case at bar, a substantial deposit was made on the date that the expropriation petition was filed. When the Court of Appeal rendered its decision, legal interest was paid on the excess amount of compensation awarded for the property taken and severance damages to the remainder from the date the answer was filed until the date payment was made. When the Supreme Court ultimately refused the State's writ application on the issue of the award for delay damages, an additional deposit was made to cover this award of $300,000.00 plus legal interest thereon from the date the answer was filed until the payment was made. Thus, substantial amounts of interest have been paid on the excess awards of compensation.

Petitioner is not satisfied, however, and claims that it is constitutionally mandated to receive interest on these awards from the date the State filed its expropriation suit. The specific issue raised by the application, therefore, would seem to be whether or not the State, while

acknowledging an obligation to pay interest, has the discretion to set a reasonable date on which the interest is to begin running.

Under the Quick Taking statutory scheme in Louisiana, a deposit of estimated compensation is made at the time the expropriation suit is filed. If no answer requesting additional compensation is timely filed, the State may obtain a judgment indicating that the initial deposit is judicially declared to be just compensation to the landowner. In the absence of an answer, therefore, the possibility of legal interest on an excess award never arises.

In 1988, the Louisiana Legislature amended the interest statute to indicate that legal interest on an excess award would not begin to accrue until the landowner filed such an answer setting forth a judicial demand for additional compensation, thereby putting the issue of additional compensation on the table. This statute in no way limited the right of the landowner to immediately file an answer seeking additional compensation, but merely sought to provide an incentive for a landowner who felt aggrieved by the amount of the deposit to put the question of compensation at issue without undue delay. Petitioner argues that this somehow placed an undue burden on the landowner because the landowner needed time to "put his case together" before filing such an answer. This complaint ignores the fact that the landowner knows well in advance of the actual filing of the expropriation suit that his property will be taken. Before the suit is filed, the State is statutorily bound to obtain estimates of compensation from qualified appraisers and to make an offer to the landowner based on those appraisals. As a practical matter, therefore, the landowner

has general knowledge of the project at the time that the project is announced, more specific knowledge at the time the appraisals are being made, and very specific knowledge of how much is being offered when a formal offer is made to him based on those appraisals. During this entire time, especially after the specific offer is made to him, he is able to obtain the services of expert personnel to assist him in evaluating his situation. Even if he does not do these things before the State files its suit, he can still file an answer immediately thereafter and the Courts will give him a reasonable time to prepare his case before trial.

The State has acknowledged that interest is due on excess compensation awarded over the amount of the original deposit and recognizes that there must be some reasonable starting point for the interest to begin accruing. For instance, it would not be reasonable for the State to statutorily decree that interest will begin to run one year from the date of taking, no matter whether an answer is filed prior to that time or not. Considering the fact that the landowner may file an answer setting compensation at issue at anytime after the expropriation suit is filed, and further considering that legal interest traditionally begins to run from date of judicial demand in other types of litigation, the Louisiana statute in effect from 1988 to 1992 was not arbitrary in setting the date of judicial demand for additional compensation as the beginning date for the tolling of interest.

It is unknown whether or not other states have similar provisions, but this writer has been unable to find any other federal cases which raise this identical issue. It appears that petitioner could not find any cases raising

the identical issue either since none of the cases cited in its application are directly on point.

IS PETITIONER ENTITLED TO ADDITIONAL RECOVERY UNDER AMENDMENT V TO THE U.S. CONSTITUTION?

Even if this Court believes that interest on excess compensation should begin to accrue from the date of taking, which was the date on which the expropriation suit was filed in this case, it is submitted that McMillion Dozer has received compensation, including interest, under the Louisiana constitutional and statutory scheme which far exceeds the amount of compensation and interest to which it would have been entitled under the Fifth Amendment to the U.S. Constitution. While the award for the property expropriated and severance damages to the remaining property would be compensable under the Fifth Amendment to the U.S. Constitution, the award of $300,000.00 for delay damages (as well as the legal interest paid thereon from the date of answer through the date of payment) would not have been compensable under that amendment according to the decisions of this Court and other Federal Courts. These damages were awarded for the 5 year period *prior* to the formal expropriation in 1989 despite the clear evidence in the record that the property continued to be utilized by McMillion Dozer Services in the same manner during that period which it had been prior to that time.

This Court recently re-examined what governmental activities would constitute a "taking" other than the actual formal expropriation of property. *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992). While the

Lucas case and its predecessors dealt with regulatory takings, the rationale should be the same for other governmental activities such as pre-expropriation activities which indirectly impact landowners. In *Lucas* this Court again repeated that it has avoided any set formula for determining when a government regulation or activity has gone too far, but recognized the two basic categories that have triggered the awarding of compensation in these situations.

> "We have, however, described at least two discreet categories of regulatory action as compensable without case specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical invasion of his property. In general, at least with regard to permanent invasions, no matter how minute the intrusions, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas,* supra at p. 2893.

> "The second situation in which we have found the categorical treatment appropriate is where regulation denies all economically beneficial productive use of land . . . As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interest or denies an owner economically viable use of his land'." *Lucas,* supra at p. 2893.

In the instant case, there was no physical invasion of petitioner's property prior to the actual expropriation. Thus, there was no pre-expropriation taking under the first category referred to above. Neither was there a pre-expropriation taking under the second situation

described above. The State of Louisiana has a legitimate state interest in the planning of construction projects. This planning did not deny the petitioner economically viable use of its land since it continued to utilize the land for the same purpose and in the same manner as it did prior to that time. Oddly enough there was an argument made in the *Kirby* case relied on by petitioner similar to the claim for delay damages awarded and paid herein. In denying that claim, this Court said:

> "The filing of a complaint in condemnation and a notice of lis pendens, petitioner contends, has the effect of preventing the owner of unimproved land thereafter from making any profitable use of it, or of selling it to another private party. At the same time, the owner remains liable for property taxes. Such a thoroughgoing abrogation of the owner's rights, petitioner submits, surely constitutes a taking as soon as the abrogation is effective, regardless of when the land is officially appropriated under the terms of the statutes." *Kirby* at p. 12.

> "However, we do not find, prior to the payment of the condemnation award in this case, an interference with petitioner's property interest severe enough to give rise to a taking under the foregoing theory. Until title passed to the United States, petitioner was free to make whatever use it pleased of its property. The government never forbade petitioner to cut the trees on the land or to develop the tract in some other way. Indeed, petitioner is unable to point to any statutory provision that would have authorized the government to restrict petitioner's usage of the property prior to payment of the award.

> "Nor did the government abridge petitioner's right to sell the land if it wished. It is certainly possible, as petitioner contends, that the initiation of condemnation proceedings, publicized by the filing of a notice of lis pendens, reduced the price that the land would have fetched, but impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking. . . . At least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment." *Kirby*, supra at p. 13.

Thus, while these delay damages may have been compensable under Louisiana's constitutional and statutory scheme of compensation, they clearly would not have been recoverable under the Fifth Amendment of the U.S. Constitution. Even if petitioner would have been entitled under the Fifth Amendment to the U.S. Constitution to additional interest for the 16 1/2 months between the date of taking and the date it filed its answer, this legal interest (approximately 16%) on the additional award for the property expropriated and severance damages (a total of $263,048.00) was more than exceeded by the $300,000.00 (plus legal interest of $116,266.00 on that amount), paid for the delay damages which would not have been recoverable under the Fifth Amendment to the U.S. Constitution. If, therefore, one looks at the totality of the amount recovered by McMillion Dozer under Louisiana law, it far exceeds the amount that would have been recovered by McMillion Dozer pursuant to the Fifth Amendment to the U.S. Constitution. McMillion Dozer

seems to argue that it should recover under both; however, the only possible constitutional issue for this Court to consider is whether or not McMillion has received compensation for the taking of its property in an amount sufficient to satisfy the constitutional requirements of the Fifth Amendment to the U.S. Constitution. Clearly it has!

PROCEDURAL AND JURISDICTIONAL DEFICIENCIES

Petitioner argues to this Court that it raised this issue in the Louisiana courts. It fails to inform this Court, however, that it failed to raise the issue in the proper manner in the Louisiana courts. The Attorney General for the State of Louisiana was never made a party to the proceeding in Louisiana State courts as required by Louisiana Code of Civil Procedure Article 1880 and Louisiana Revised Statute 13:4448. In *Lemire v. Nopsi*, 458 So. 2d 1308 (La. 1984), the Louisiana Supreme Court said:

> "Further, where the constitutionality of a statute is at issue, the attorney general must be served and is an indispensable party. La. C.C.P. Art. 1880. The attorney general was not served nor was he made a party to this action. Accordingly, we do not reach the issue of the constitutionality of La. R.S. 13:5105." *Lemire* at p. 1311.

Another Louisiana case involving the propriety of raising the issue of the unconstitutionality of a statute at the appellate level was considered in *Hodges Ward Burrington Properties v. Lee*, 601 So. 2d 358 (La. App. 5th Cir. 1992):

> "We are unable to address the constitutionality of LSA-R.S. 47:2180.1 since it is well established that the constitutionality of a statute must first

> be questioned in the trial court, not the appellate court . . . Furthermore, the claim of unconstitutionality must be specifically pleaded in a proceeding in which the attorney general is served as an indispensable party." *Hodges Ward* at p. 360.

As acknowledged by petitioner, the version of the interest statute complained of was only in effect from 1988 through 1992, when the Legislature decided to return to the pre-1988 basis for awarding legal interest on excess compensation awards. Respondent seriously disputes the contention of petitioner in brief that thousands of other Louisiana landowners have been adversely affected. Since the vast majority of landowners either amicably sell to the State, accept the amount deposited in the registry of the court or file an answer soon after the expropriation suit is filed, this version of the interest statute in effect from 1988 through 1992 had little, if any, effect on them. Of those who could have raised the issue, only a few have done so despite the fact that the statute was amended almost three years ago to its pre-1988 form. Clearly the issue raised by petitioner does not involve an *important* question of federal law which needs to be addressed or settled by this Court.

CONCLUSION

The issue raised in this writ application concerns a Louisiana statute which was only in effect from 1988 through 1992. The effect of that temporary statute was not to deny compensation for the taking of property nor interest on excess compensation awarded by the Court. The sole effect was to reasonably limit the beginning of the tolling of interest from the date judicial demand was filed by a landowner for excess compensation. Even if that statutory restriction somehow violated the spirit of the Fifth Amendment to the U.S. Constitution, the State of Louisiana more than made up for it by paying a substantial amount of compensation which would not have been compensable under the Fifth Amendment. The landowner has therefore received more than adequate compensation pursuant to the spirit of the Fifth Amendment to the U.S. Constitution and its writ application should be rejected.

Respectfully submitted,

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